ARIZONA PUBLIC SERVICE COMPANY

IBLA 75-281 Decided April 25, 1975

Appeal from decision of the Arizona State Office, Bureau of Land Management, requiring payment of filing fees and service charges equal to the cost of processing certain applications.

Set aside and remanded.

1. Administrative Procedure: Rule Making -- Fees -- Regulations: Publication -- Regulations: Validity

   Where notice of proposed rule making to change certain filing fees and to impose other charges has been published in the Federal Register, but no final rules have been published, the old schedule of fees will remain in effect until such time as the new rules are finally adopted, published and made effective.

2. Regulations: Binding on the Secretary -- Regulations: Force and Effect as Law -- Secretary of the Interior
   A departmental regulation promulgated pursuant to and comporting with statutory authority has the force and effect of law. One who exercises the delegated authority of the Secretary may not disregard the plain and unambiguous provisions of a mandatory regulation so as to impose a more onerous requirement on an applicant than is prescribed by the regulation in effect.

3. Applications and Entries: Generally -- Regulations: APplicability
Regulations: Applicability

> Where applications for a right of way and a special land use permit are filed in conformity with the requirements of regulations then in effect, and the regulations are amended while final action on the applications is pending, but the amended regulations are made effective at a future date, then if the right of way and permit are issued prior to the effective date of the amendments they will not be subject to the added requirements; but if the applications are still pending when the amendments become effective, the new regulations will govern.

APPEARANCES: William A. Simson, Arizona Public Service Co., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Arizona Public Service Company appeals from the December 4, 1974, decision of the Arizona State Office, Bureau of Land Management (BLM), which required filing fees and payment of other charges for right-of-way application A 8778 R/W and special land use permit application A 8774 SLUP in the amount of $9,100 -- the estimated cost of processing the applications. The action of the Arizona State Office was predicated on instructions dated October 7, 1974, from the Associate Director of the BLM. Those instructions required that BLM offices collect filing fees and other payments in certain cases in an amount equal to the cost of processing the application. Appellant argues that there is no authority for requiring more than the $10 filing fee for applications as provided by the current regulation. 43 CFR 2802.1-2. That argument is clearly correct.

[1] The pertinent statutory provisions state that:

> Notwithstanding any other provision of law, the Secretary of the Interior may establish reasonable filing fees, service fees and charges, and commissions with respect to applications and other documents relating to public lands and their resources under his jurisdiction, and may change and abolish such fees, charges, and commissions. Before any action is taken under this section, the Secretary shall publish in the Federal Register notice of his intention to take such action, and shall

> afford interested parties a period of thirty days, or, if he shall find it advisable, more, within which to submit data, views and arguments, either in writing or, if he shall deem it desirable, in open hearing.

43 U.S.C. § 1371 (1970).

> All fees, charges, and commissions prescribed by existing law or regulation shall remain in effect until changed or abolished by the Secretary.

43 U.S.C. § 1372 (1970).

On September 3, 1974, notice of proposed rule making was published in the Federal Register, 39 F.R. 31906 (1974). 1/ The proposed rules would amend certain portions of 43 CFR Subpart 2802 to provide that filing fees and service charges should equal the cost of processing the applications. On October 4, 1974, the time for submitting comments on the proposed regulations was extended to October 18, 1974. 39 F.R. 35801 (1974). Clearly, the proposed regulations are not effective until they are published as final rules, thus superseding the old regulation. 43 U.S.C. § 1372 (1970); see also Federal Register Act, 49 Stat. 500, as amended, 44 U.S.C. § 1501 et seq. (1970). 2/

1/ Unless otherwise provided by law, as in this case, 43 U.S.C. § 1371 (1970), this Department is not required by section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970), to give notice of proposed changes in regulations, to invite public comment, or to hold public hearings. Richard K. Todd, 68 I.D. 291, 300 (1961), aff'd sub nom. Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); Wade McNeil, 64 I.D. 423, 429 (1957), rev'd on other grounds sub nom. McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960), with the Court of Appeals specifically stating at 936 that Interior Department business with respect to public lands is exempt from the requirements of section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). See also statement of Douglas, J., in n. 1, dissenting in National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759 (1969).

Nevertheless, the Department of the Interior is committed as a matter of declared policy, 36 F.R. 8336 (1971), to follow the provisions of section 4 of the Administrative Procedure Act.

2/ In the notice of proposed rule making, 39 F.R. 31906 (1974), 31 U.S.C. § 483a (1970), as well as 43 U.S.C. § 1371 (1970), is cited as authority for the proposed changes in the regulations. The former law was enacted in 1951, 65 Stat. 290, and states that it is the sense of Congress that agencies should generally charge an amount equal to the full value of services rendered to all persons except those engaged in transacting Government business. It

[2] Moreover, a departmental regulation promulgated pursuant to and comporting with statutory authority has the force and effect of law. General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969); Whatloff v. United States, 355 F.2d 473 (8th Cir. 1966); Leonard E. Simmons, 12 IBLA 196 (1973). The Secretary, or his delegate, is without authority to disregard the plain and unambiguous provisions of his own mandatory regulations where the rights of third parties have intervened. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). We hold that the Department is likewise proscribed from imposing a more onerous requirement on an applicant than is specified by the regulation in force, notwithstanding the absence of any third party involvement. In Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950), the Supreme Court made the following observation:

> The only claim of law violation is that the Secretary is proposing to violate his own regulation, promulgated pursuant to the Act and hence having the force of law. That it binds him as well as others while it is in effect is not doubted.

> The regulation requiring payment of only a $10 filing fee is effective and binding until finally revoked or amended in accordance with established procedure. 43 U.S.C. § 1372 (1970). No other charge than that prescribed by present regulation may be assessed. See 43 CFR 1822.1-1, which provides:

> § 1822.1 Payments.
> § 1822.1-1 Amount.

> (a) The amount of payments required in connection with the processing of any application sale, entry, lease, permit, or other transaction governed by the regulations in this chapter are set forth in applicable regulations.

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fn. 2 (continued)
might be argued, then, that the Department has authority to change fee schedules without further ado. However, 43 U.S.C. § 1371 (1970), which was enacted in 1960, 74 Stat. 506, provides that "[n]otwithstanding any other provision of law" the Secretary has plenary authority to set "reasonable" fees and provides for procedural requirements which must be followed to change them.

Appellant's argument that it should be exempt from any filing fee since it is engaged in official Government business by providing electricity to governmental agencies is frivolous in the absence of showing that Government is its sole customer.

However, while this opinion was in preparation, certain amendments of 43 CFR subpart 2802 were published as final rule-making in the Federal Register for April 23, 1975 (40 F.R. 17841, et seq.). Some significant changes have been made in the new regulations from what was published as proposed rule-making.

Despite this development, it does not moot the error committed by the Bureau in requiring the appellant to comply with the proposed regulations rather than the regulation in force then, and still in force as this is written. The new regulations will not be effective until June 1, 1975. If the right of way and special use permit are granted prior to that date, only the $10 filing fees may be treated as "earned," and the balance of the monies remitted under protest by the appellant must be refunded. See Gilbert V. Levin, 64 I.D. 1 (1957). On the other hand, if the applications are yet pending final action on the effective date of the amended regulations the new regulations will govern. Desert Outdoor Advertising, Inc., 2 IBLA 344 (1971). But cf. J.J. Newman Lumber Co., A-27205 (Oct. 10, 1955).

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded to the Arizona State Office for action consistent with the views expressed herein.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Newton Frishberg
Chief Administrative Judge